No. 83-9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW MEXICO, ex rel.
"One Minute of Silence" Statute, et al.,

Petitioners,

—vs.—

JUAN G. BURCIAGA, U.S. District Court Judge
for the District of New Mexico,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

DAN A. GONZALES
SAENZ, GONZALES & FERREIRA
300 East Griggs
Las Cruces, New Mexico 88001
(505) 423-8504

CHARLES S. SIMS, *Counsel of Record*
JACK D. NOVIK
American Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Attorney for Plaintiffs Below
Jerry and John Duffy

October, 1983

QUESTION PRESENTED FOR REVIEW

Should this Court grant a writ of certiorari to review the Tenth Circuit's denial of a petition for writ of prohibition seeking to enjoin the enforcement of a district court judgment, where petitioners were not parties in the district court, nor privy to the proceedings, and neither participated nor were represented in the district court in any way?

LIST OF PARTIES TO THE PROCEEDINGS

The present petition for a writ of certiorari is being misrepresented to the Court as a petition ex rel. the State of New Mexico. Neither the present petition nor the petition for a writ of prohibition in the Tenth Circuit was instituted by the Attorney

General of the State of New Mexico in the name of, or on behalf of, the State of New Mexico. The State of New Mexico and its Attorney General were not parties in and did not participate in any way in either the district court or the Court of Appeals. They have had nothing to do with the present, unauthorized petition. Therefore, they are not parties here under this Court's rules.

Similarly, although the Las Cruces Public Schools, its Superintendent, and the members of its Board of Education were parties defendant in the district court, they took no appeal to the Tenth Circuit, and were not parties in or represented in any way in the proceedings in the Tenth Circuit in which the real petitioners here, purporting without authority to act "ex rel." the State of New Mexico, sought a writ of prohibition. Accordingly, under this Court's Rule 17 they are not parties here either.

Petitioners correctly identify only the sole named respondent, the Honorable Juan G. Burciaga, United States District Judge for the District of New Mexico, whose final judgment in Duffy v. Las Cruces Public Schools, 557 F.Supp. 1013 (D.N.M. 1983) they seek to enjoin even though they were neither parties nor privy to the record and did not participate in any way in the proceedings in the district court.

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JURISDICTION

This Court lacks jurisdiction pursuant to 28 U.S.C. §1254(1), since the petitioners were not "parties" in any civil or criminal case in the Court of Appeals sought to be reviewed. Oregon State Elks Assn. v. Falkenstein, 409 U.S. 1099 (1973); Ex parte Leaf Tobacco Board, 222 U.S. 578, 581 (1911); Ex parte Cutting, 94 U.S. 14, 20-22 (1877). Jurisdiction does not lie under 28 U.S.C. §1651, since the writ sought is neither "necessary" nor "appropriate" under these circumstances, and is not in aid of this Court's appellate jurisdiction.

STATEMENT OF THE CASE

The New Mexico Legislature, during its 1981 session, enacted Section 25-5-4.1(NMSA 1978), which authorizes each local school board to institute a period of silence at the beginning of the school day to be used for contemplation, meditation, or prayer. On October 19, 1981, Jerry Duffy, on his own behalf and as next friend of John P. Duffy, his minor son, filed a complaint for declaratory and injunctive relief in the United States District Court for the District of New Mexico to declare the statute unconstitutional and to enjoin its implementation in the Las Cruces Public Schools. Named as defendants were the Las Cruces Public Schools; John E. Stablein, Superintendent; and Joan Pucelik, Walter Rubens, Vincent Boudreau, Ms. Tom Salopek, and Everett Crawford, in their official capacities as members of the Las Cruces Board of Education.

The case was tried before the Honorable Juan G. Burciaga, United States District Judge. All of the issues were thoroughly and exhaustively briefed by both sides pursuant to a motion to dismiss, a motion for summary judgment, and in post-trial memoranda. On February 10, 1983, the court entered an order granting the injunctive and declaratory relief requested by the plaintiffs. (See Petition App. 1 and App. 25).

During a public meeting held in Las Cruces, the defendant Board of Education voted unanimously not to appeal the district court judgment. The defendants, in fact, expressed relief that the statute and its attendant litigation, which had caused tremendous controversy and political devisiveness within the community, had finally been laid to rest.

One Jean Walsh, a petitioner here, who was not a party to the proceedings below,

nevertheless sought to prosecute a direct appeal to the Tenth Circuit. Although Walsh purported to be acting in her own behalf and "in behalf of children within the Las Cruces School District", Walsh did not allege that she had children of her own within the school district. Walsh asserted standing to appeal as a taxpayer, alleging previous payment of attorneys fees and costs by the Risk Management Division of the State of New Mexico. (It should be noted, however, that no tax monies were spent in defense of the action, nor in the award of attorneys fees to the prevailing party, inasmuch as the defendants maintained a policy of insurance with the Risk Management Division from which such fees and expenses were paid.) On June 29, 1983, the Tenth Circuit dismissed Walsh's appeal for lack of standing.

Unsatisfied with the decision of the district court and correctly anticipating the

denial of her frivolous appeal, Walsh and others filed a petition for a writ of prohibition in the Tenth Circuit on March 30, 1983 (App. 42-79). On April 8, 1983 before The Honorable Robert H. McWilliams, The Honorable James E. Barrett, and The Honorable William E. Doyle, Circuit Judges, the Tenth Circuit denied Walsh's petition (App. 29). The pending petition for a writ of certiorari pertains only to the Tenth Circuit's denial of that petition for a writ of prohibition.

SUMMARY OF ARGUMENT

The Tenth Circuit determined that Jean Walsh, a petitioner herein, lacked standing to appeal the judgment entered in Duffy v. Las Cruces Public Schools, 557 F. Supp. 1013 (D.N.M. 1983). Nevertheless, Walsh and others similarly situated then filed a petition for writ of prohibition in the Tenth Circuit to enjoin enforcement of the judg-

ment. Those petitioners, by and through their attorney, Eugene E. Klecan, have intentionally deceived the Tenth Circuit and now this Court by captioning their petition, "STATE OF NEW MEXICO,ex rel.," when, in fact, there was no appeal taken from the district court's judgment and the State of New Mexico has not participated in these proceedings in any way.

The Tenth Circuit's denial of the requested writ of prohibition does not, under these circumstances, warrant this Court's review.

ARGUMENT

Petitioners have not demonstrated any basis for this Court's jurisdiction to grant this petition. See supra, at 1.

Petitioners insist that the Tenth Amendment to the United States Constitution

guarantees them "The right to defend the sovereignty." (Pet.App. 45). They assert that any act of any state legislature is an act of self-government and therefore a right guaranteed to the people by the Tenth Amendment, not subject to review by the federal judiciary. Such a conclusion leads to the absurd result that the Tenth Amendment takes precedence over all other provisions of the United States Constitution, even where state action has been judicially determined to be unconstitutional. This is not the law. Cooper v. Aaron, 358 U.S. 1 (1958).

Petitioners argue that unless the district court's judgment is enjoined, they will suffer a denial of their right to petition the government for a redress of grievances. But they are free to petition whomever they choose, notwithstanding any actions allegedly taken by the courts below. Moreover, petitioners have not been

legally aggrieved by the judgment. The injunction was entered against only the defendants in the underlying law suit. No injunction was entered against Walsh and the other petitioners herein.

To hold that the Tenth Amendment guarantees "to the people" the right to govern themselves in a constitutionally impermissible manner is legally untenable, and would deny Jerry and John Duffy their First Amendment rights which they successfully protected in a case from which defendants did not appeal.

Petitioners and their attorney have gone to great lengths to create lengthy and expensive litigation, and to mislead this and other courts in their attempts to introduce religious activity into the public schools in violation of the First Amendment. This frivolous petition should be promptly denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DAN A GONZALES
SAENZ, GONZALES & FERREIRA
300 East Griggs
Las Cruces, NM 88001
(505) 423-8504
CHARLES S. SIMS,
Counsel of Record
JACK D. NOVIK
American Civil Liberties
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132 West 43 Street
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